



**IRCP**

Institute for International Research on Criminal Policy  
Ghent University

Prof. Dr. G. Vermeulen – Joint investigation teams – Police Master – Tallinn, 26 April 2007

---

## Joint investigation teams

### International legal and overall theoretical framework

Prof. Dr. Gert Vermeulen

Police Master - Comparative Criminal Justice Systems  
Tallinn, 26 April 2007



## Structure

---

- > concept
- > potential added value
- > comparison international legal bases
- > JIT components adding LE value
- > information/evidence-related reflection
- > recommendations
- > beyond
- > bottom-line
- > questions & discussion



## Concept (1)

---

- > principal legal bases: EU 2000 MLA Convention & FD 2002
- > teams composed of judicial, police and/or customs officers or even of officials of international organisations & bodies (e.g. Europol, Eurojust, OLAF?, ...)
- > may be set up for a specific purpose and for a limited period in case of
  - > difficult and demanding international investigations
  - > coordinated, concerted action between MS necessary
- > headed and led by official state where team operates
- > seconded team members operating in another state shall be bound by the law of that state
- > seconded team members may be entrusted by teamleader with task of certain investigative measures

## Concept (2)

---

- > team members may request own authorities to take the necessary investigative measures in their own state as if they would be taken in a domestic investigation
- > information lawfully obtained by seconded team members may be used in their own state
- > Eurojust must be informed of setting up
- > philosophy
  - > Europol intelligence (AWF's)
  - > Europol request MS to start/coordinate investigations
  - > MS set up team, with support Europol analyst
  - > MS inform Eurojust
  - > Eurojust coordinates prosecution
- > also in other conventions/legal instruments (different rules)



## Potential added value (1)

---

- > 1. depending on availability/applicability int'l legal basis
  - > EU 2000 MLA Convention (13)
    - > = most complete convention basis
  - > EU FD 2002 JITs: identical + BUTs
  - > 2001 CoE 2nd Additional Protocol MLA (20)
    - > copy of Article 13 EU 2000 MLA Convention
  - > Naples II (24)
  - > 2000 UN TOC Convention (19)
  - > EU-US 2003 MLA Convention (5)
  - > (2nd Europol Protocol)
- > applicable convention provisions
  - > vague/detailed? non/self-executing (NSE/SE)?



## Potential added value (2)

---

- 2. depending on extent/quality of adoption proper implementing JIT legislation
  - convention-basis required or not?
  - which (how many) conventions qualify as valid JIT basis?
  - implementation of NSE convention provisions?
  - implementation even of SE convention provisions?
    - especially relevant if no convention basis is required or where limited/less elaborated convention is relied on
  - provisions beyond Article 13-covered issues?, such as e.g.
    - capacity national/foreign members to draw up official reports
    - use of evidence
- 3. depending on compatibility of national combinations relating to above items





## Comparison int'l legal bases (3)

---

- > common characteristics all conventions
  - > difficult & demanding investigations requiring coordination
  - > for specific purpose & limited time
  - > leadership with country of operation
  - > locus regit actum
- > EU 2000 MLA Convention & CoE 2001 Protocol
  - > much more potential
  - > potential full use EU concepts
    - > Europol intelligence (AWF's)
    - > Europol request MS to start/coordinate investigations
    - > MS set up team, with support Europol analyst
    - > OLAF participation?
    - > MS inform Eurojust
    - > Eurojust coordinates prosecution



## Example 2004 (B,BG,D,NL,UK)

	EU 2000	Naples II	CoE 2001	UN TOC
applicable for	NL	B D NL UK	BG	B BG NL
considered potentially valid basis for JIT establishment	B D NL UK	B D NL	B BG D NL	B BG D NL



## JIT components adding LE value: NSE/SE (1)

	EU 2000	Naples II	CoE 2001	UN TOC
right to request investigative measures in home country	yes (SE)	no provision	yes (SE)	no provision
right to provide the JIT info available in home country	yes, spontaneous (NSE)	yes, spontaneous (NSE)	yes, spontaneous (NSE)	no provision
right to use at home info lawfully obtained	yes (SE)	yes (SE)	yes (SE)	no provision
JIT-obtained info usable as evidence in home country	vague (only for 'info') (NSE)	possible but conditionable (NSE)	vague (only for 'info') (NSE)	no provision
criminal and civil liability regulated	yes (SE)	yes (SE)	yes (SE)	no provision
right to carry & use service weapons	no provision	no provision	no provision	no provision

## JIT components adding LE value: NSE/SE (2)

	EU 2000	Naples II	CoE 2001	UN TOC
<i>seconded members</i>				
right to be present	yes (SE) (refusable)	no provision	yes (SE) (refusable)	no provision
right to carry out investigative tasks	possible (NSE)	no (SE)	possible (NSE)	no (SE)
<u><i>representatives 3rd countries &amp; int'l bodies</i></u>				
right to be present	possible (NSE)	no provision	possible (NSE)	no provision
right to carry out investigative tasks	possible (NSE)	no provision	possible (NSE)	no provision

## JIT components adding LE value: NSE/SE (2)

	Naples II	EU 2000	CoE 2001	UN TOC
<i>seconded members</i>				
right to be present	no provision	yes (SE) (refusable)	yes (SE) (refusable)	no provision
right to carry out investigative tasks	no (SE)	possible (NSE)	possible (NSE)	no (SE)
<u><i>representatives 3rd countries &amp; int'l bodies</i></u>				
right to be present	no provision	possible (NSE)	possible (NSE)	no provision
right to carry out investigative tasks	no provision	possible (NSE)	possible (NSE)	no provision



## Information/evidence-related reflection

---

- > approach: JITS “in context”, i.e. compared/confronted with
  - > regular mutual legal assistance (MLA)
  - > (future) “mutual recognition (MR)” -based MLA
  - > police cooperation/Europol
  - > Principle of Availability (PoA)
  - > draft FD data protection 3rd pillar
  - > forum choice (involving Eurojust)
- > structure
  - > relevant provisions
  - > scenarios of info/evidence gathering/use + subslides

## Relevant provisions (Article 13 EU MLA 2000)

---

- > para 3b: locus regit actum (SE) + possible additional conditions seconding states (NSE)
- > para 5: right for seconded members or for representatives of third countries or international bodies to be present during taking of investigative measures (NSE)
- > para 6: right for seconded members or for representatives of third countries or international bodies to carry out investigative tasks (NSE)
- > para 7: right for seconded members to directly request investigative measures in home country (could be SE)
- > para 9: right to provide the JIT information available in home country (NSE)
- > para 10: right to use lawfully JIT-obtained information in home country + specialty rule (SE)



## Scenarios of info/evidence gathering/use

---

- > where gathered
  - > in another MS, in a 3rd state, internally?
- > by whom (foreign/own authorities?)
- > context of gathering
  - > primarily internal purposes, following MLA request, in JIT context?
- > status (existing, new, real-time?)
- > type of measures required?
  - > coercive/intrusive/privacy-invading?
- > type of source (administrative, military, criminal justice?)
- > type of purpose of use? (similar as for source)
- > use (information/pre-evidence, evidence)
- > in context of police (LE) or judicial cooperation?





## Where/By whom/Context

---

- > relevant scenario combinations
  - > abroad (in another MS - in a 3rd state)
    - > by local authorities for primarily internal purposes
    - > by local authorities following regular MLA request
    - > by local/foreign authorities in JIT context (JIT operating abroad)
    - > by local authorities in JIT context (JIT operating elsewhere), following request by local JIT-member
    - > by own authorities in JIT context (JIT operating abroad)
  - > internally
    - > by foreign authorities in JIT context



## Abroad (1)

---

- > information
  - > internally collected – later transferred
    - > acceptable, often even where not in accordance with own legal system
  - > if collected following request for investigative measures which would not be acceptable in own system
    - > exclusion?
  - > lawfully collected by JIT member
    - > may be used in all JIT-involved states (para 10)



## Abroad (2)

---

- > evidence
  - > internally collected – later transferred
    - > acceptable, except usually where (manifestly) not in accordance with own legal system
  - > in accordance with fundamental principles of domestic legal system and with own legislation (forum regit actum following MLA request)
  - > in JIT context (i.e. locus regit actum): no guaranteed evidential use
    - > by local authorities, either when JIT operating abroad or following request local JIT member when team operates elsewhere
    - > by own authorities, where bestowed with investigative powers (locus regit actum) and within national mandate
      - > strict dual locus check
      - > additional questions: mandated to draw up official domestic reports? having evidential value back home?
    - > by foreign authorities, where bestowed with investigative powers and within national mandate
      - > worst case scenario = strict triple locus check



## Internally

---

- > i.e. by foreign authorities in JIT context
  - > where bestowed with investigative powers
  - > and within their national mandate
- > distinction
  - > information
    - > no problem
  - > evidence
    - > mandated to draw up reports having domestic evidential value in MS of evidence gathering?



## Assessment

---

- > JIT-collected information
  - > may be used as information
    - > depending on JIT treaty basis
      - > which treaty – applicability
    - > in the absence of applicable SE convention provision
      - > fully depending on domestic legislation
      - > of all states involved (compatibility issue)
  - > no guaranteed use as evidence whatsoever
    - > due to locus regit actum rule
    - > for evidential purpose therefore
      - > inferior to information collected through forum regit actum-based MLA request



## Status (1)

---

- > scenarios
  - > existing
  - > new
    - > requires investigative measure/execution of request
  - > real-time
    - > telecom interception & bank account monitoring





## Status (2)

---

- > relevance
  - > regular MLA: irrespective of status
  - > JIT-cooperation
    - > possible advantages: request home, right to presence, active investigative position
    - > as for existing information/evidence: inferior to
      - > PoA: obligation to provide LE-relevant information
      - > proposed Evidence Warrant
    - > as for new/real-time information
      - > inferior to announced full replacement MLA with binding MR-based orders/warrants issued by forum state, rendering (almost) automatically information evidence-worthy



## Type of measures required

---

- > Y/N coercive/intrusive/privacy-invading?
- > relevance for police cooperation
  - > Schengen (Article 39): “for police use only” info exchange only where no coercive/... measures are required
  - > JIT cooperation: no improvement
  - > as opposed to: Prüm Treaty, PoA (for existing information)
- > relevance for judicial cooperation
  - > regular MLA: dual criminality + compatibility law requested state
  - > JIT cooperation: no changes
  - > as opposed to
    - > for existing evidence: proposed Evidence Warrant
      - > no dual criminality requirement for 38 offences
    - > for new/real-time evidence: announced MLA-replacement with MR
      - > similar irrelevance dual criminality
      - > relevance of compatibility with law executing state low



## Type of source

---

- > traditionally
  - > criminal intelligence operation or criminal investigation/proceedings
- > trend
  - > administrative/military (OLAF, terrorism, Echelon ...)
  - > violating upon purpose limitation principle and upon separation of powers
- > JIT cooperation
  - > traditional cooperation in criminal matters
  - > luckily! also for practitioners?

## Type of purpose of use (specialty rule)

---

- > traditional police cooperation
  - > Schengen/Europol
    - > prevention and detection criminal/administrative offences
    - > preventing immediate/serious threat to public security
- > traditional judicial cooperation
  - > regular MLA
    - > criminal proceedings (including administrative offences)
    - > related judicial + administrative proceedings
    - > preventing immediate and serious threat to public security
    - > other use on request
- > proposed FD data protection police & judicial cooperation
  - > similar
- > as opposed to JIT cooperation
  - > limited in 1st instance to only investigated offences



## Recommendations

---

- > ratify various conventions & specify all as potential JIT basis
- > provide detailed implementation legislation
  - > preferably not requiring convention basis
  - > or also usable in case of bilateral conventions
  - > at least implementing NSE provisions + also transposing SE provisions
  - > regulating also additional issues
    - > mutual ability to draft official reports
    - > mutual evidential acceptability of official reports?
      - > mirroring e.g. 1969 Benelux Convention
    - > specify evidential value of JIT-collected information
    - > even better: draft general evidence admissibility rules
      - > e.g. Belgian implementing legislation
- > pre-prosecutorial evidence-related reflection required
  - > Eurojust?



## Beyond

---

- > full MR in “pre-evidence” cooperation?
  - > instead of MR mitigated by equivalent access principle
    - > as foreseen in draft FD PoA
  - > genuine “pre-evidence” warrant for use in criminal intelligence operation or criminal investigation/proceedings
  - > to be issued by police, customs + even: judicial authorities
- > mutual recognition evidence
  - > as contemplated by EC: if gathered lawfully in locus state: per se acceptable?
    - > bypassing judicial review/scrutiny in MS?
- > better option?
  - > minimum harmonization of criminal procedural law standards
  - > combined with MR of evidence gathered accordingly
    - > e.g. IRCP draft FDs on witness collaboration/protection
  - > see: EU constitution





## Bottom-line

---

- > JITs don't make police work easier
- > on the contrary (quite a burden, unless worth it)
- > = sophisticated concept
- > the primary added value is most likely for judicial cooperation in criminal matters
- > police JIT relevance is in
  - > tackling crime more effectively
  - > because
    - > jointly, i.e. on a broader than just national scale
    - > making full use of intelligence at EU/international level (including through Europol)
  - > more openness to foreign police/LE/judicial/legal culture



**IRCP**

Institute for International Research on Criminal Policy  
Ghent University

Prof. Dr. G. Vermeulen – Joint investigation teams – Police Master – Tallinn, 26 April 2007

## Questions & discussion

---